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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JASON SANCHEZ, Defendant and Appellant.	B262845 (Los Angeles County Super. Ct. No. KA101576)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed as modified.

Laura Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Ryan M. Smith, Deputy Attorney General, for Plaintiff and Respondent.

This is a case primarily about how the natural and probable consequences doctrine applies to gang confrontations. The key questions we answer are (1) whether defendant and appellant Jason Sanchez (defendant)—a member of the North Side Pomona criminal street gang (North Side)—intended to aid and abet an assault after driving a fellow gang member and another man to a liquor store located in territory claimed by rival gang South Side Pomona (South Side), and (2) whether the shooting that resulted after the gang banging started between the rival gangsters was foreseeable. We also consider defendant's various other assignments of error to the bench trial that resulted in his conviction: that the court improperly relied on its knowledge of other gang cases to convict him, that his request to represent himself made only at the end of trial should have been granted, that his retained trial attorney provided constitutionally deficient representation, that the court wrongly prevented him from inquiring about the character of one of the South Side gang members, and that the court improperly convicted him of being both a principal and an accessory after the fact.

I. BACKGROUND

A. The Offense Conduct

Late in the evening on March 29, 2013, defendant drove two men to the Sunny Liquor store in South Side territory.[1]

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[1] Sunny Liquor store is located at the intersection of East Mission Boulevard and South La Mesa Street in Pomona. The store faces Mission and has a parking lot in the front. To the right looking out of the store's entrance are more parking spaces; to the left is a small fenced in area, and then La Mesa. The parking lot is accessible via a driveway on La Mesa and appears

North Side member Daniel Barrios (Barrios) sat in the back seat of defendant's SUV, and another man unidentified at trial sat in the front passenger seat. When the three men (collectively, the North Side group) arrived in the area of the liquor store, they encountered a group that included, among others, two South Side gang members, Everett Cervantes (Cervantes) and Marco Geary (Geary), and two women, Darlene Ruiz (Ruiz) and Rosalinda Mora (Mora) (collectively, the South Side group).

There is not much dispute about what happened after members of the North Side and South Side groups were within a few feet of each other and exchanged words. Geary punched Barrios in the face. Defendant briefly advanced closer to the fight with his hands raised. Barrios then pulled a gun and fired a shot toward the South Side group, at least some of whom began running away, and defendant and the front passenger then started heading back toward the SUV. Ruiz looked back toward Barrios when she heard the gunshot and Barrios fired another bullet, which went through her arm and lodged in her chest. Back at the SUV, defendant flipped one of his license plates up to conceal the license number, and he drove off seconds later with Barrios and his other passenger in tow.

The main factual dispute at trial was instead about the events leading up to the shooting, including who said what when. The confrontation between the two groups was captured by multiple video cameras at Sunny Liquor, but the cameras did not capture any audio of what transpired. Ruiz and Mora, who were both part of the South Side group, testified at trial and provided

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to also be accessible via a driveway on Mission. The intersection is a T-intersection; La Mesa does not continue past Mission.

the only direct evidence of the verbal exchange that preceded the assaults.

Ruiz viewed video from surveillance camera 9, which faced away from the store toward an outdoor fenced area on store property closer to La Mesa. Ruiz confirmed that it was her group that can be seen walking along La Mesa in the background at the top of the video screen. Ruiz explained that prior to that scene, the group had been hanging out at a trailer park across the street from Sunny Liquor, which places the group on Mission initially. Ruiz also explained they were on their way to a party.

Ruiz testified that as they walked in the vicinity of Sunny Liquor, Ruiz saw a black "Tahoe" pulling into the store's parking lot and noticed "some guys" in the Tahoe looking at the group, in a "serious" way, not a friendly way. The SUV is not directly visible in the camera 9 video, which indicates that it turned onto La Mesa from Mission.[2] Ruiz did not provide a clear timeline of the South Side group's passage down La Mesa Street, which runs perpendicular to Mission Boulevard.

The camera 9 video provides some of the details and timing of the South Side group's movement. The group was walking along in a smaller subgroup of four and a group of two that followed. The group of four pauses past a driveway to the Sunny Liquor parking lot, and the group of two follows, slowly crossing the driveway. The headlights of defendant's SUV are then on the backs of the two stragglers as defendant turns into the parking lot. The group of two then catches up with the waiting group of

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[2] If the SUV had been driving up La Mesa toward Mission, it would have passed the channel 9 camera before it reached the driveway to the parking lot.

four, and at this point, the SUV is inside the parking lot. (On the camera 1 video, also shown to Ruiz, the SUV can be seen beginning to turn into a parking space inside the lot at this time.) Cervantes, wearing a white t-shirt, then steps farther out into the street and a few feet back toward Mission, where he pauses facing the liquor store parking lot. The front passenger side door of defendant's SUV opens and a man gets out; defendant's driver side door is also open. Cervantes then moves closer to the parking lot, and a second person (who defendant identifies in his opening brief as Mora) stands between Cervantes and the parking lot, putting an arm up as if to hold him back. Cervantes pauses briefly, and then moves toward the parking lot, stopping to set a can of beer down on the way, and Geary follows with him. At the same time, defendant, now fully out of the SUV (with his hands concealed in a front pocket of his sweatshirt), walks toward the South Side group, as does Barrios, who by this point has also exited the SUV.

Ruiz also testified about the sequence of events. She said that the driver (defendant) and front passenger got out of the SUV and walked toward Ruiz's group. One of them called Cervantes over. Both defendant and the front passenger asked Cervantes where he was from. Cervantes replied South Side Pomona. According to Ruiz, the passenger previously sitting in the backseat of the SUV (Barrios) asked Cervantes where he was from, and Cervantes again said "South Side." Barrios replied, "North Side." "[Cervantes] said fuck North Side and that's when [Geary] came and socked him [Barrios] in the face and the guy fell."

Mora provided a similar account of events. She testified a "black truck" caught her attention as her South Side group

walked by Sunny Liquor.[3] The truck parked in front of the store, the driver (defendant) and front passenger got out, and they asked her group if they "banged." Cervantes said, "South Side Pomona." Another man (Barrios) got out of the backseat of the truck and walked over, and the men then "started telling each other where they were from, banging." Mora heard, "North Side Pomona" and someone from her group said, "South Side Pomona." At that point, Mora started walking away because she "knew something was going to happen." She elaborated, explaining: "[I]f two . . . people from different gangs are going to be telling each other something, obviously something is going to happen." Something did in fact happen, namely, the fistfight and shooting we have already described. Mora testified she heard a gunshot, but did not immediately realize Ruiz had been hit.

After the shooting, Ruiz went to the hospital, accompanied by Mora. At the hospital, Ruiz initially falsely told police she was shot in a drive-by shooting. Mora, too, initially gave the police a false account. But both women testified they subsequently told the interviewing officer the truth about what happened once they overcame their fear or nervousness.

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[3] Mora testified that the truck had tinted windows and she could not see inside. We have reviewed the camera 1 video, and the front side windows are not heavily tinted; the front seat passenger and the driver are easily visible. Of course, the front windshield was not tinted either.

B. Prior Gang Shooting Involving Defendant (Admitted Pursuant to Evidence Code Section 1101, Subdivision (b))

The prosecutor offered evidence that defendant had been involved in another assault with a deadly weapon at a liquor store in gang territory approximately four years earlier. That assault was also captured on surveillance video, which the prosecutor played for the court. The victim of that assault, James Thomas, also testified.

Thomas recalled that on June 1, 2009, at about 8:45 p.m., he walked to the J & W Liquor Store on Foothill Boulevard in Pomona. Two men got out of a black four-door sedan and walked into the store behind Thomas. Thomas noticed that the driver remained in the sedan. When Thomas completed his purchase at the counter and turned to leave, one of the men from the sedan with tattoos on his head (defendant, as later identified in a six-pack photospread by Thomas) asked him where he was from. Thomas replied that he was from Cincinnati, and pointed to his Cincinnati Reds baseball cap. Defendant then asked Thomas if he was a "blood." Thomas understood this to be a question about whether he was in a gang. Thomas said "no" and added that he had "friends that are bloods, crips, Black, White, Mexican, people all over." Defendant said, "That's cool."

When Thomas walked outside the store, the driver of the sedan was standing outside his car. He asked Thomas why he was "mad dogging" him, and Thomas replied that the man had been staring at him and Thomas wondered who he was. The driver then asked Thomas where he was from, and his tone seemed angry. Thomas answered, "What's that got to do with you [?]" Thomas then realized that he was surrounded, with the

driver in front of him and defendant and the other man from the store behind him. The driver said something to the effect of being from either North Side Pomona or West Side Pomona, and Thomas noticed the driver's hand was behind his back. The driver then looked at defendant and tilted his head back as if asking the defendant a question. Defendant nodded his head twice, and the driver pulled out a gun and shot at Thomas, hitting him in the back upper thigh before Thomas was able to escape into the store.

Defendant pled guilty to assault with a deadly weapon in connection with the Thomas shooting. He was represented in that matter by Edward Esqueda, who also represented him at trial in this case.

C. Gang Evidence

The parties stipulated that defendant was stopped in 2004 in the company of two North Side members. They also stipulated that defendant had "Pomona" tattooed on his chest, the letters "SGV" on the back of his head, "PNS" on the top of his head, "NSP" on his left leg, and "TMS" on his right leg.

The parties also stipulated that North Side and South Side are criminal street gangs within the meaning of section 186.22, and that Los Angeles Police Department Detective Eric Berger was a qualified expert in criminal street gangs including both of the specific gangs at issue.[4]

Detective Berger testified North Side uses the initials "PNS," "N," "S," and "NS." Defendant's "NSP" tattoo was a variation of the gang initials, standing for North Side Pomona.

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[4] The Clerk's Transcript indicates the stipulation applied to both North Side and South Side, not just South Side.

Defendant's "TMS" tattoo stood for Tiny Midget Squad, a clique or subset of North Side. In Detective Berger's opinion, defendant had been a member of North Side for at least ten years.

Detective Berger also provided an overview of gang culture. Gangs claim territory as a place where gang members can conduct business. Gang members guard their territory and maintain it through fear, intimidation, and violence. They want the people in the area to be afraid of them so they will not contact the police if a crime occurs. Gangs also want members of rival gangs to fear them.

Gang members increase their status within the gang by committing crimes such as "selling narcotics for the gang, assaulting people, . . . shooting rival gang members, putting in work." They commit crimes together, both because there is an expectation they will back each other up during crimes and because they want to ensure there is a gang witness to the crimes they have committed, i.e., the "work" that they are putting in. In some cases, gang members yell out the name of their gang to be recognized for the act they are committing and to instill fear of the gang in their victims.

In Detective Berger's experience, it is typical for gang members to carry weapons. Gang members know who among them in a group has a weapon because that person is expected to use the weapon on any rival gang members the group encounters.

In gang culture, the question "where you from" is meant to ask a person what gang he or she is from. The purpose of the question is either to see if the person is "friends with that gang or . . . to instigate . . . violence." Berger testified there is never a proper response to the question: "[i]t's always . . . a challenge." "[I]t's a challenge to fight with either their hands, with weapons,

with some sort of violence." In Detective Berger's experience, if the phrase were used by a gang member to a rival, it would "escalate the matter."

Detective Berger confirmed that Sunny Liquor was in territory claimed by South Side and J & W Liquor, the site of the earlier Thomas incident, was in territory claimed by North Side. He explained that in his experience, gang members are aware of the location of their own territory and of rival gangs' territories. It is particularly important to be aware of rival gang territory because going into that territory will be very unsafe for a member of another gang. On cross-examination, Berger was asked whether he knew of cases where a gang member would enter territory of a rival gang for a non-criminal purpose. Berger agreed he did, explaining it would be risky but he was "sure it's been done." But Berger added: "[F]or three gang members going into a rival's territory, I haven't seen that.

In response to a hypothetical question intended to track the facts of this case, Detective Berger opined that the crimes were committed for the benefit of the gang. The crimes would increase the status of the gang members because the crimes show the participants are brazen enough to drive into a rival's neighborhood, confront the gang, and commit an act of violence. Specifically, as to the "where you from" questions Berger was asked to assume the driver (defendant) and front passenger asked of the South Side rivals, Berger opined "that's a challenge to a fight, a shooting, whatever may be—it's going to escalate into violence at that point."

D. Verdicts and Sentencing

The trial court found defendant guilty on all charged counts: one count of assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(2),[5] one count of attempted murder in violation of sections 664 and 187, and one count of being an accessory in violation of section 32. The court found true allegations that the offenses were committed for the benefit of a criminal street gang, within the meaning of section 186.22, subdivision (b). The court also found true the firearm and recidivism enhancements alleged against defendant and sentenced him to a total term of 48 years to life in state prison. The court stayed sentence on the assault and accessory convictions pursuant to section 654.

II. DISCUSSION

We vacate defendant's section 32 accessory conviction because, on the facts established at trial, it is inconsistent with his conviction as an aider and abettor on the other counts of conviction. We otherwise reject defendant's claims of error and affirm the judgment as modified. The evidence was sufficient to find him guilty of attempted murder and assault with a deadly weapon on a natural and probable consequences theory because there is substantial evidence he facilitated the commission of an intended target assault on the rival South Side members on their "home turf" and because the escalation of such a planned gang assault into a shooting would be reasonably foreseeable to a reasonable person in defendant's position. The bevy of other

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[5] Undesignated statutory references that follow are to the Penal Code.

contentions defendant raises on appeal fail for reasons we shall explain.

A. Sufficiency of The Evidence

Defendant was convicted as an aider and abettor of the charged crimes of assault with a deadly weapon and attempted murder, and the prosecution relied on the natural and probable consequences theory of aiding and abetting.[6] Defendant contends there is no substantial evidence to support his convictions for assault with a deadly weapon and attempted murder because there is no evidence he aided and abetted the identified target offense, simple assault, and because the shooting was not a foreseeable consequence of what he describes as "making a gang challenge." He maintains his federal constitutional right to due process accordingly requires reversal of the attempted murder and assault convictions.

1. The natural and probable consequences doctrine

"'A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable." [Citation.]' [Citation.] Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have

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[6] Defendant contends, correctly, that the trial court did not find he directly aided and abetted Barrios in the shooting.

known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 920.)

2. Sufficiency of the evidence standard of review

"'"[W]e review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation.]'" (*People v. Williams* (2015) 61 Cal.4th 1244, 1281.) "It is well settled that, under the prevailing standard of review for a sufficiency claim, we defer to the trier of fact's evaluation of credibility." (*People v. Richardson* (2008) 43 Cal.4th 959, 1030.) This same standard of review applies where the factfinder is the court, rather than a jury. (*People v. Garcia* (1970) 4 Cal.App.3d 904, 910; see also *United States v. Erhart* (8th Cir. 2005) 415 F.3d 965, 969.)

3. Defendant aided and abetted an intended assault

Defendant believes there is no evidence he aided and abetted a target offense for three reasons. In his view, (1) the prosecutor and court erroneously agreed that mere words could constitute an assault and so relied on a non-existent offense of

"verbal assault" to support liability under the natural and probable consequences doctrine; (2) even if a verbal challenge could constitute the offense of assault, defendant merely stood by while the challenge was issued, which falls short of aiding and abetting; and (3) even if the court did understand an assault must involve an attempt to inflict physical injury, no one in defendant's group actually committed a simple physical assault. As will become apparent in our discussion of defendant's claims, the first and third claims are claims of legal error more than they are complaints about the insufficiency of the evidence. But however characterized, defendant's arguments lack merit.

a. the court did not rely on a non-criminal target offense

As defendant acknowledges, the target crime in this case was identified as simple assault. He asserts the prosecution relied only on the act of asking "where you from," and he argues the lone act of asking this question cannot constitute an assault.

In a jury trial, "when the prosecution relies on the 'natural and probable consequences' doctrine to hold a defendant liable as an aider and abettor, the trial court must, *on its own initiative*, identify and describe for the jury any target offense allegedly aided and abetted by the defendant." (*People v. Prettyman* (1996) 14 Cal.4th 248, 268.) The purpose of this requirement is to ensure that the jury does not convict the defendant "based on the jury's generalized belief that the defendant intended to assist and/or encourage unspecified 'nefarious' conduct." (*Ibid.*) The defendant must intend to aid and abet the commission of a criminal act. (*Ibid.*)

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) The word "attempt" has a specific meaning in section 240. "Unlike criminal attempt where the act constituting an attempt to commit a felony may be more remote, [a]n assault is an act done toward the commission of a battery and must immediately precede the battery. (Perkins & Boyce, Criminal Law (3d ed. 1982) p. 164 (Perkins).)" (*People v. Williams* (2001) 26 Cal.4th 779, 786 [internal quotation marks omitted].) "An assault occurs whenever [t]he next movement would, at least to all appearance, complete the battery. (Perkins, *supra*, p. 64, italics added.)" (*People v. Williams*, *supra*, at p. 786 [internal quotation marks omitted].) Words alone cannot constitute an assault because they are not an attempt to inflict a violent injury on the person of another, although they may provide an indication of an intent to inflict such an injury. (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1604; see also *People v. Miceli* (2002) 104 Cal.App.4th 256, 269 ["To point a loaded gun in a threatening manner at another (especially if accompanied by threats to shoot, as here) constitutes an assault, because one who does so has the present ability to inflict a violent injury on the other and the act by its nature will probably and directly result in such injury"].)

The prosecutor here told the court: "The People argue that the target crime, *although not carried out*, was simple assault . . . . [W]hat we have is the defendant who drives into rival territory with rival gang members, confronts them knowing full well what could happen next. Knowing full well that by challenging these rival gang members what could happen next." (Emphasis added.) The prosecutor continued, "You have a

defendant who is prepared, willing and able and does everything he can to instigate an assault and then that assault occurs not in the fashion he wants it to . . . ."

After listening to argument from the defense and the prosecution, the court stated: "The court has questions [and] since this is a court trial we can [flesh] things out with counsel." After more discussion, the court asked the prosecutor, "And the nature of the assault is the challenging words?" The prosecutor replied, "The nature of the assault is the challenging words [that] the defendant should know is going to escalate and lead to an assault." The court then stated, "Understood . . . . The question arises when two people commit an assault or understand[ ] the conduct would lead to an assault by the use of the words where are you from? Is it reasonably foreseeable that the events would escalate to the point where a weapon would be used or death—a weapon would be used and someone be shot." Later, the court stated, "The court has already indicated that the target[ ] offense is the assault. The assault was initiated by the use of the word."

Considered in context, the colloquy between the court and counsel does not show the court believed an assault could be committed by the use of words alone. Rather, the prosecutor's theory of the case was that the question was the prelude to the intended assault, not the assault itself, and was also circumstantial evidence of the North Side group's intent to commit an assault. The court's comments show that it ultimately had the same understanding. As the court theorized, the speaker may have hoped for a physical response from the victim which the speaker believed would "justify" the speaker's planned use of

force.[7] We are therefore convinced the record does not show, unambiguously or otherwise, the court's verdict was premised on an incorrect understanding of the law. (See *People v. Tessman* (2014) 223 Cal.App.4th 1293, 1303).

b. defendant's aiding and abetting conduct

Defendant further contends, however, that even if the gang challenge was evidence of an intent to commit a crime, he did nothing to aid the challenge. He claims he merely stood by and so cannot be held liable as an aider and abettor for any offenses which might be a natural and probable consequence of the challenge.

As we have just discussed, the challenge itself was not a crime. It was evidence that an assault was planned by defendant and his companions. And the challenge plus other evidence at trial was sufficient to show defendant facilitated the confrontation in which the challenge was issued, and that he did so intending to promote an assault on rival gang members.

Defendant, a gang member, drove a fellow North Side member and another unidentified man to the Sunny Liquor store, which was in territory claimed by rival South Side. The gang expert's testimony established gang members are generally aware of the boundaries of rival gang territory because it is very unsafe for such gang members to enter that territory. It is

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[7] As the court made clear, a "person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force. And the nature of the provocation is where are you from? That is the classic language that invites a response either verbally or in terms of actual conduct."

accordingly reasonable to infer defendant was aware Sunny Liquor was in South Side territory.

The surveillance video footage demonstrates defendant must have been aware of the South Side group. The video shows defendant paused while driving to let the group of two stragglers cross the La Mesa driveway before driving into the Sunny Liquor parking lot. According to Ruiz, the "guys" in the SUV looked at the group in a "serious" way which was not friendly. Beyond mere awareness of the South Side group, the evidence even permits an inference that defendant opted to follow the group, as he turned onto La Mesa from Mission and used the La Mesa parking lot driveway rather than using what appears to be a driveway accessible directly from Mission.

Once all members of the South Side group had crossed the driveway, the group remained standing just past the driveway. The video shows that the group would have been visible from the parking lot. Together with his front seat passenger, defendant got out of his SUV in rival gang territory while two or three young men stood watching them from a distance. Defendant and his front seat passenger then walked away from the entrance to the liquor store that was directly in front of the SUV (a curious move, to say the least, if they were interested only in buying beer) and toward the men standing in the street; Barrios followed just moments later.[8] Even if defendant had never said a word,

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[8] Ruiz testified that either defendant or the front seat passenger called Cervantes over. Defendant argues on appeal that the video contradicts this testimony and shows Cervantes turned around and started approaching the parking lot before the SUV was even parked. This movement was slow and does not contradict Ruiz's testimony that defendant or his passenger

his conduct up to this point demonstrates he had an active role in aiding and abetting a physical confrontation between the two groups. There were several people in the South Side group, and as the gang expert testified at trial, gang members are expected to back up their fellow gang members during a crime.

According to Ruiz and Mora, however, defendant did more than merely stand by while his companions confronted the South Side group members with "where you from" questions; defendant also challenged South Side member Cervantes with a similar question of his own. Defendant argues we should disbelieve Ruiz and Mora's testimony because the surveillance video does not show defendant speaking. This argument misses the mark. Although there is video from multiple surveillance cameras, none show defendant's face for more than a second or two. Thus, the video in no way proves defendant was mute throughout the events in question.

When Cervantes continued to claim "South Side Pomona," defendant remained with his confederates. The expert testimony allowed the trial court to infer that the challenges defendant and others in his group had issued were, as the expert explained in answering the prosecution's hypothetical, "going to escalate into violence at that point."[9] Indeed, even non-gang-member and non-

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called Cervantes over. There is nothing inherently improbable about calling a person over even though that person may be moving vaguely in one's direction.

[9] Defendant faults gang expert Berger's testimony because, in his view, it is too equivocal regarding the consequences that would flow from a gang challenge. He highlights, in isolation, the expert's statement during one part of his testimony that the purpose of asking "where you from" is to "see maybe, A, if they

gang-expert Mora knew this. She testified she walked away at that point because, with the confrontation underway via questions of "where you from" and gangs being claimed, "obviously something is going to happen." Yet defendant remained with Barrios and the front passenger, and the fighting and shooting started just seconds later.[10]

This evidence is sufficient to show that defendant intended to aid and abet a physical assault on one or more of the people in the South Side group. That Geary actually beat the North Side group to the punch is immaterial. The video, the testimony from Ruiz and Mora, and testimony from gang expert Berger

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are friends with that gang or B, to instigate, you know, violence." This ignores Berger's subsequent clarification that there is no good response to the question (at least for someone who is not in the same gang as the challenger) "because it's always—it's a challenge" to fight with hands or weapons. Defendant's reliance on the generic testimony by Berger also fails to take into account his testimony when giving his answer to a hypothetical tracking the particular facts of this case, as quoted *ante* at p. 10.

[10] As it turned out, the manner in which defendant participated in the confrontation was all that was necessary to "back up" his companions, or so a reasonable factfinder could conclude. The fight, which lasted just a few seconds, was confined to Barrios and Geary—others in the more numerous South Side group did not join in. When Geary punches Cervantes in the face, the video footage shows defendant advancing closer to the fight with his hands raised. But Barrios was armed, and he drew his weapon in a flash after he got hit. No one in the South Side group drew a firearm in response, and there was therefore no need for defendant to intervene further when the South Side group scattered.

established that defendant assisted his companions in confronting rival gang members in that rival gang's territory and that the purpose of the confrontation (as if there really could be any other) was to commit an assault.

c. the target offense need not be "completed"

Defendant contends that even if the court understood that the target crime was a physical assault, there was no evidence a simple physical assault preceded the assault with a deadly weapon and attempted murder.

The prosecutor acknowledged that a simple assault did not occur, but asserted that the target crime did not have to be completed for the natural and probable consequences doctrine to apply. The prosecutor was correct. (*People v. Ayala* (2010) 181 Cal.App.4th 1440, 1443 (*Ayala*); *People v. Laster* (1997) 52 Cal.App.4th 1450, 1464-1465 (*Laster*).)

"[M]ost often, where the target offense differs from the crime actually committed so that it is necessary to instruct on the 'natural and probable consequences' rule, the target offense and the actual offense consist of different acts. (E.g., *People v. Bishop* (1996) 44 Cal.App.4th 220, 228–235, 51 Cal.Rptr.2d 629 [defendant convicted of murder as a natural and probable consequence of burglary and robbery which he aided and abetted].) Accordingly, the usual formulation of the 'natural and probable consequences' test looks to whether the actual offense is a 'consequence' of the target offense. (E.g., *People v. Prettyman, supra*, 14 Cal.4th at p. 261 ['[A] defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet . . . , but also for any other crime that is

the "natural and probable consequence" of the target crime.'].)" (*Laster*, *supra*, 52 Cal.App.4th at pp. 1463-1464.)

"[I]n some cases, [however,] the target offense and the actual offense may consist of the same act *by the perpetrator*; for example, where the aider and abettor intends to facilitate an assault with a deadly weapon, but the perpetrator commits a murder. (See, e.g., *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1189–1191, 27 Cal.Rptr.2d 695; see also *People v. Bunyard* (1988) 45 Cal.3d 1189, 1231–1232, 249 Cal.Rptr. 71, 756 P.2d 795.)" (*Laster, supra,* 52 Cal.App.4th at p. 1464.)

"[T]he aider and abettor may be liable where he intentionally aids and encourages one criminal act, but the perpetrator actually commits some other, more serious, criminal act. Thus, the real question is not whether the actual offense was a consequence of the target offense; it is whether the charged crime was a consequence of *the aider and abettor's facilitation* of the target offense." (*Laster*, *supra*, 52 Cal.App.4th at pp. 1464-1465; accord, *Ayala*, *supra*, 181 Cal.App.4th at p. 1443 ["A defendant may be convicted under the natural and probable consequences doctrine even if the target criminal act (. . . allegedly assault with a baseball bat) was not committed. An aider and abettor may be liable where he intentionally aids one criminal act but the perpetrator actually commits some other, more serious criminal act that is reasonably foreseeable"].)

The situation present in *Ayala* and *Laster* is in all material respects the situation present here. The assault with a deadly weapon and attempted murder offenses were a consequence of defendant's facilitation of the target simple assault offense. That Barrios in fact committed a more serious criminal act than defendant perhaps intended, such that the simple assault was

never completed,[11] does not defeat application of the natural and probable consequences doctrine. Rather, so long as the more serious offenses were indeed natural and probable eventualities, criminal liability properly attaches.

4. Foreseeability

Defendant contends the evidence was insufficient to satisfy the requirement that assault with a deadly weapon and attempted murder would naturally and foreseeably result from the gang confrontation that occurred. He maintains there "must be some additional facts to support the expectation that a violent confrontation will ensue from the act aided," and he emphasizes the lack of any proof that any of the participants knew Barrios had a gun.

The absence of evidence to prove defendant knew Barrios was armed is not dispositive. A shooting can be a foreseeable consequence of a gang challenge that initially results in a fistfight even though an aider and abettor does not know a fellow gang member has a firearm. (*People v. Medina* (2009) 46 Cal.4th 913, 921-922.) As *Medina* explains, expert testimony about gang culture generally and about the specific gang in question, together with evidence of defendant's own behavior and other relevant evidence, can be sufficient to support a conviction. (*Id.* at p. 922.)

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[11] It is perhaps more precise to say the simple assault was committed simultaneously with the more serious offenses. (*Laster, supra,* 52 Cal.App.4th at p. 1464; *In re Brandon T.* (2011) 191 Cal.App.4th 1491 [misdemeanor assault is a necessarily included offense of assault with a deadly weapon].)

We have already explained there was sufficient evidence to permit the trial court to conclude defendant aided and abetted an intended assault. A factfinder could reasonably infer, based on the gang expert's testimony, that defendant was aware he was in rival South Side territory and knew members of South Side (a gang that had committed murders and attempted murders) would defend their turf. Defendant and Barrios's gang, North Side, was also a violent gang, and it is reasonable to infer that one or more members of such a gang would likely have a weapon knowing they were travelling in the territory of a rival violent gang.[12] Additionally, defendant's actions facilitated the commission of an intended assault, and the pre-emptive punch ultimately landed by Geary does not change the analysis. Thus, the only question that remains is whether a reasonable person in defendant's position would know that an intended simple assault against a rival gang in their claimed territory could naturally and probably escalate into a shooting.

Defendant's conduct in the earlier Thomas incident with strikingly similar facts is strong evidence that a person in his position would reasonably foresee that a "where you from" confrontation for purposes of an assault would escalate into a shooting. In the Thomas case, the victim denied any gang membership but defendant's companion still shot Thomas after

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[12] The surveillance video shows defendant exiting the SUV shortly after the front seat passenger but lagging a bit behind until Barrios got out of the SUV and walked toward the South Side group, at which point defendant moves quickly to join his two passengers. Defendant's actions could support a reasonable inference that he was waiting for Barrios before approaching the South Side group because he knew or believed Barrios was armed and it would be safer to approach the group in his company.

asking him where he was from and looking to defendant, who nodded his head twice, before shooting. It is foreseeable that defendant or a fellow gang member might react just as harshly when a challenge results in a physical response from the person or group confronted, as was the case here. That is particularly true if the incident occurs in rival gang territory and there is accordingly concern about being slower than the rival gang to escalate the level of violence. Further, defendant's behavior in the Thomas incident, particularly his act of nodding at the shooter that can be understood as a direction to shoot, is evidence that defendant believed a gunshot is the appropriate way to deal with an intended victim that expresses even a hint of disrespect.

To be clear, we do not hold, as the dissenting opinion feared in *Medina*, that "the challenge 'Where are you from?' is so provocative in the context of gang culture that any response up to and including murder is a reasonably foreseeable consequence of that utterance, so as to justify a murder conviction not only of the actual perpetrator but also of any other gang members involved in the target offense, *whatever the surrounding circumstances*." (*Medina*, *supra*, 46 Cal.4th at p. 932 (dis. opn. of Moreno, J.), italics added.) Rather, it is (a) the similarities to the earlier Thomas incident that ended in a shooting, (b) the location of the confrontation here in rival South Side's own territory (which the South Siders would almost certainly take as a sign of disrespect that requires a retaliatory response), and (c) the occurrence of the shooting contemporaneously with the planned target assault that supports the trial court's finding that the attempted murder and assault with a deadly weapon crimes were foreseeable. Put simply, a rational trier of fact could find a reasonable person in defendant's position would know a shooting was a foreseeable

outcome of the gang-motivated assault that was intended. (See, e.g., *Ayala*, *supra*, 181 Cal.App.4th at pp. 1448-1453 [fatal shooting during a planned physical attack upon perceived rival gang members]; *People v. Hoang* (2006) 145 Cal.App.4th 264, 275-276 [victim stabbed after defendant brought fellow gang members to confront victim for a verbal slight]; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1055-1056 [shooting of rival gang member during retreat from fight]; see also *Medina*, *supra*, 46 Cal.4th at pp. 926-927 ["the precise consequence need not have been foreseen" and, thus, it was foreseeable "the verbal confrontation by the Lil Watts gang members would likely escalate into some type of physical violence" even if the precise form of violence could not be pinpointed from the verbal challenge alone].)

In summary, there is sufficient evidence that defendant intended to aid and abet the target crime of simple assault and that the assault with a deadly weapon and attempted murder committed by Barrios were a foreseeable consequence of that intended assault. Because we conclude a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, the due process guarantees of the United States and California constitutions are satisfied. (*People v. Carter* (2005) 36 Cal.4th 1114, 1156.)

B. Judicial Misconduct

Defendant contends the court considered the facts of other cases to decide the shooting in this case was reasonably foreseeable. He argues this deprived him of his right to an impartial trier of fact and his Sixth Amendment right to confront and cross-examine witnesses against him.

1. The court's references to other cases

Defendant highlights four instances in which the trial court referred to other gang cases in discussing its reasons for finding defendant guilty.

In the first instance, the court referenced the case of *People v. Olguin* (1994) 31 Cal.App.4th 1355 in the following manner: "Is it reasonably foreseeable that the events would escalate to the point where a weapon would be used or death—a weapon would be used and someone be shot[?] [¶] It is—I think of the language of another case dealing with gangs and natural and probable consequences because it witnesses in this regards to the testimony of Wilson and Zamora. [¶] This is the case where a person, a gang member was upset that someone had stricken out his graffiti on the street that he lived. This is *People v. Olguin* . . . . He [Olguin] had already armed himself. There was a confrontation. The court's words were that . . . the fact [a co-defendant] knew Olguin was unhappy enough about having his graffiti defaced to arm himself and recruit [a co-defendant] and [another man] to seek out the perpetrator of that insult, the fact that all three were shouting at [the victim] when [the co-defendant] punched him, and the fact [the victim] did not appear intimidated by being outnumbered, escalation of this confrontation to a deadly level was much closer to inevitable than it was to unforeseeable, so there is little room to quarrel with the jury's result in terms of conviction."

In the second instance, the court appears to again reference *Olguin* in the portion of the following transcript excerpt we have italicized: "Where are you from? The response was South Side Pomona . . . . [T]he shooter then says North Side Pomona. The response from [Geary] was both verbal and physical. Fuck North

Side Pomona and then walloped him in the jaw. Was that all foreseeable? It sure was to Ms. Mora. As soon as the words where you from and the response North Side Pomona [were uttered] . . . . It's the words going on and she knows, hey, these aren't two people just shouting [at] each other. Something is going to happen. And that's why she left the area. *It doesn't take an expert, gang expert to talk about the inevitability of what's going to happen because it's always the [prelude] to some physical action by one side or the other . . . . [¶] . . . [¶] That's why I quoted that case is that was it reasonably foreseeable* by [defendant] when he got out of that car, followed his right seat front passenger as he made the challenge to those individuals about where you from and stayed there."

Third, the court referred generically to cases over which it had presided, explaining, "I've heard multiple dozens of cases like this where someone has a family member living in the midst or in the middle of a rival gang's territory and they assume the risk of going over there and visiting knowing full well what if I'm identified or what if I have a confrontation? And I have to be prepared for that. [¶] So this is not something that was surprising. This is not something that was unexpected. This is something that was, as I think the court said, was inevitable than foreseeable [*sic*]."

Fourth and finally, the court stated, "It was reasonably foreseeable that things would escalate under the circumstances that the gang members confronted each other and the person that initiated that confrontation reasonably expected that would escalate and the firearm would be introduced. There are plenty of cases that cover that."

2. Forfeiture

We agree with respondent that defendant forfeited his claim of judicial misconduct by failing to object to the challenged comments in the trial court. "A claim of pervasive judicial bias does not necessarily require an objection to be preserved because such an objection may be futile, but '[a]s a general rule,' isolated 'judicial misconduct claims are not preserved for appellate review if no objections were made on those grounds at trial.' [Citation.]" (*People v. Banks* (2014) 59 Cal.4th 1113, 1177 overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363.)

We do not believe defendant's claim can be reasonably understood as one of pervasive judicial misconduct, and the record makes clear the court stated it intended to engage in a more informal discussion after the close of evidence to "[flesh] things out with counsel" because the case was not tried to a jury. Under the circumstances, it was incumbent on defense counsel to object if it believed the court's comments were improper so as to allow court to proceed in a more formal fashion and clarify, if necessary, the basis for its ruling. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1141 [claim forfeited where defendant failed to bring an asserted deficiency in trial court's ruling to the court's attention and thereby deprived the court of an opportunity to correct the error].) Nevertheless, because defendant asserts his attorney's failure to object constituted ineffective assistance of counsel, we opt to explain why his claim of error fails on the merits. (*People v. Farnam* (2002) 28 Cal.4th 107, 193, fn. 39.)

3. Merits analysis

Neither party has cited any California cases in discussing defendant's claim that the trial court relied on specialized knowledge not in evidence to convict him. Defendant does cite one Michigan case where the trial judge convicted the defendant based in part on the judge's knowledge, acquired in the judge's prior experience as a prosecutor, of how drug raids are conducted, which caused the judge to disbelieve the defendant's account of what happened when the police entered his house. (*People v. Simon* (1991) 189 Mich.App. 565 [473 N.W.2d 785, 787].) But the remainder of the cases cited by both parties are California cases discussing juror misconduct.

A juror may not obtain information about a case that was not received into evidence at trial, or offer such information to other jurors. (*In re Lucas* (2004) 33 Cal.4th 682, 696.) Similarly, a juror "should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." (*In re Malone* (1996) 12 Cal.4th 935, 963.)

At the same time, "'[j]urors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience.' (*People v. Marshall* (1990) 50 Cal.3d 907, 950.) This experience may stem from education or employment, but sometimes it comes from other personal experiences. We previously have explained that . . . '[j]urors cannot be expected to shed their backgrounds and experiences at the door of the deliberation room.' [Citations.] Rather, 'jurors are expected to bring their individual backgrounds and experiences to bear on the deliberative process.' (*People v.*

Pride (1992) 3 Cal.4th 195, 268 [ ].)" (*In re Lucas, supra*, 33 Cal.4th at p. 696.)

In *People v. San Nicolas* (2004) 34 Cal.4th 614, our Supreme Court was called to decide whether to reverse the defendant's conviction because a juror who was a nurse explained "a number of the medical issues relating to blood pressure and circulation" during jury deliberations. (*Id.* at p. 648.) The Court held that the evidence "does not show that [the nurse] offered the jurors any basis for deciding the case other than the evidence and testimony presented at trial. No declaration suggests that she made any assertion inconsistent with the properly admitted evidence and testimony. Indeed, the remarks attributed to her in her declaration are consistent with the trial testimony of the pathologist, who expounded at length on the concept of blood flow, circulation, and the meaning of 'shunting.'" (*Id*. at p. 650, citing *People v. Steele* (2002) 27 Cal.4th 1230, 1266 ["A juror may not express opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, but if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in evaluating and interpreting that evidence"].) The Supreme Court found no abuse of discretion in the trial court's ruling that the juror did not commit misconduct. (*Id.* at p. 650.)

Although the cases involving juror misconduct are not directly on point, the *San Nicolas* case is instructive here. Each of the four comments by the trial court challenged by defendant goes to the issue of what was likely to happen as a result of the gang confrontation under the circumstances. The comments do not betray an effort by the trial judge to look to other cases for

evidence lacking in this one, but rather an effort to explain its ruling after remarking it could "[flesh] things out with counsel" because "this is a court trial." Nothing of significance in the court's comments was unsupported by the expert or percipient witness testimony in this case. Like the nurse that relied on her medical training and experience to explain concepts developed by the evidence, the court relied on its legal training and experience in an effort to persuade defendant and his attorney of the strength of its verdict on the evidence presented.

Take, for example, the court's statement that "[i]t doesn't take an expert, gang expert to talk about the inevitability of what's going to happen . . . ." This does not, as defendant contends, reveal the court was disregarding the expert testimony at trial because it was already familiar with, and relying on, the outcomes in cases with similar facts. Rather, the court had just emphasized trial witness Mora knew something was "going to happen" when the gang banging started, and the court was making the rhetorical point that ensuing violent consequences would have been obvious, even to someone without Berger's expertise.

The court referenced *Olguin* to demonstrate it had in mind the correct legal standard for evaluating natural and probable consequences and to explain its view that the verdict it reached on the facts here would not be an aberrant result under the law.[13]

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[13] Of course, to the extent the court was referring to the legal principles discussed in *Olguin* and other cases concerning the foreseeability requirement, there can be no error. (*People v. Tessman*, *supra*, 223 Cal.App.4th at p. 1302 ["As a broad general proposition, cases have stated that a trial court's remarks in a

In particular, the court appears to have briefly read from a portion of the *Olguin* opinion that concerned the defendants' actions that demonstrated foreseeability in that case, and then engaged in a detailed recitation, over four transcript pages, of the evidence presented in this case to explain why the gang challenges here were similarly likely to result in violence and why it was indeed "closer to inevitable than it was to unforeseeable" (*Olguin*, *supra*, 31 Cal.App.4th at p. 1376) that the violence would escalate into a shooting. There is nothing in the analogy that indicates the court decided this case based on *Olguin*, was biased against defendant, or violated defendant's right to confront witnesses.

The court also referred generically to there being "plenty of cases that cover" the foreseeability of firearm use in a confrontation between gang members.[14] This remark appears to have been addressed mainly to defendant himself, who at that point was essentially arguing with the court about the evidence. The court first explained that "the facts of this case" satisfied all the elements of the natural and probable consequences doctrine, and then restated matters in terms of foreseeability. Nothing in the court's attempt to explain its ruling suggests that the court

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bench trial cannot be used to show that the trial court misapplied the law or erred in its reasoning"].)

[14] The court's statement in full was: "It was reasonably foreseeable that things would escalate under the circumstances that the gang members confronted each other and the person that initiated that confrontation reasonably expected that would escalate and the firearm would be introduced. There are plenty of cases that cover that."

relied on expert testimony or facts in other cases to reach a verdict in this case.

The court also made a passing reference to its own cases. The court's first reference to "family functions," was a response to a comment made by defense counsel during closing argument. Defense counsel stated, "The record is clear that [defendant] was in the area for several hours and although we didn't have evidence to this, he was attending a family function." The court instructed defense counsel to argue within the record. Thus, the court's later reference to having heard "multiple dozens of cases like this where someone has a family member living in the midst or in the middle of a rival gang's territory and they assume the risk of going over there and visiting" is simply the court's counterpoint to an outside the record reference by defense counsel. It does not suggest these cases were relevant to any issue raised by the record in this case.

Our discussion thus far demonstrates why the Michigan case cited by defendant is inapposite. In that case, the judge was a former prosecutor and applied specialized knowledge of police raids he gained in that position—which was entirely extrinsic to the evidence presented at trial—to assess the credibility of the defendant's account of the raids. As the Michigan Court of Appeal found, "the judge, in effect, served as an expert witness against defendant . . . ." (*People v. Simon*, *supra*, 473 N.W.2d at p. 788.) That is markedly different than what occurred here, where the court's verdict was grounded in the evidence at trial and not based on specialized knowledge or expertise divorced from the testimony of the gang expert and the two key percipient witnesses. At most, the trial judge here, like the juror in *San Nicholas*, used his experience in evaluating and interpreting

evidence that had been presented. That was not improper, nor did it deny defendant his rights to an impartial trier of fact and to confront witnesses against him.

C. Motion for Self-Representation

After the prosecution had rested and defense counsel announced he would rest without calling any more witnesses beyond the three who testified during the defense case, defendant asked the court if he could fire his lawyer and represent himself. Defendant contends the trial court violated his Sixth Amendment rights by denying the motion without conducting an inquiry under *People v. Windham* (1977) 19 Cal.3d 121 (*Windham*).

1. Applicable law

As the California Supreme Court made clear almost 40 years ago, "in order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial." (*Windham, supra*, 19 Cal.3d at pp. 127-128.) "[O]nce a defendant has chosen to proceed to trial represented by counsel, demands by such defendant that he be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound discretion of the court." (*Id.* at p. 128.)

In exercising discretion on a motion for self-representation made only after trial has already begun, a trial court should consider "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow

the granting of such a motion." (*Windham, supra*, 19 Cal.3d at p. 128.) The court should inquire sua sponte into the reasons behind the request (*id*. at p. 129, fn. 6.), but our Supreme Court has "decline[d] to mandate a rule that a trial court must, in all cases, state the reasons underlying a decision to deny a motion for self-representation . . . ." (*Ibid*.)

A trial court's exercise of its discretion to deny an untimely motion for self-representation will be upheld if "there were sufficient reasons on the record to constitute an implicit consideration" of the factors identified in *Windham*. (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1206; accord, *People v. Bradford* (2010) 187 Cal.App.4th 1345, 1355 [relying on a trial court's implicit consideration of *Windham* factors is a variation on the more general rule that a trial court is presumed to have known and followed applicable law, absent a showing to the contrary].)

2. The motion

Defendant made his motion for self-representation immediately after his retained attorney, Esqueda, told the court that he and defendant had a difference of opinion about calling two additional witnesses. Esqueda had decided not to call the witnesses, but defendant believed the witnesses should testify. Esqueda explained that "it would be [his] tactical decision not to call those witnesses and that decision was made way back" such that the witnesses were not even placed on any witness list. When defendant stated he wanted to "fire" his lawyer, the court inquired as to the reason, asking if it was "based upon the fact that he's not calling these two witnesses?" Defendant replied,

"No, based on a lot of stuff like—," at which point the court interrupted to explain that the motion was untimely.

Defendant then resumed speaking, explaining again that his complaint was that he "took [his] lawyer's advice" but "want[ed] to present [his] side of the story." The court informed defendant he had the right to testify over his attorney's advice and could change his mind and elect to testify. Defendant stated he wanted to represent himself. The court replied, "At this point it's neither timely [nor would] the court accept it at this point in time." Defendant repeated, "I took a lot of his advice." The court, which was sitting as the trier of fact, responded, "Sir, I'm not going to discuss it in front of other people in terms of what your dispute is in terms of your lawyer . . . . He is the attorney that you hired . . . . The fact is the trial is now over in terms of the calling of the witnesses." The court again asked if defendant wished to testify, and defendant replied that he did not.

3. Analysis

Windham itself does not require a trial court to expressly consider on the record all the factors that decision identifies as relevant. Here, we see enough in the record to convince us the trial court had the appropriate considerations in mind when it denied defendant's request to represent himself.

We initially observe the court satisfied its obligation to inquire as to defendant's reason for making the request. (*Windham*, *supra*, 19 Cal.3d at p. 129, fn. 6.) Immediately after defendant stated he wanted to fire his lawyer, the court asked if it was because his attorney decided against calling the two witnesses defendant wanted him to call. Defendant initially denied that was the reason, saying it was "based on a lot of stuff,"

and, now on appeal, defendant faults the court for interrupting at that point. The interruption, however, was merely temporary, and just moments later defendant was able to explain his request was motivated by his desire to "present my side of the story."

As to the first *Windham* factor, the quality of counsel's representation, the court did not expressly address it. The record, however, reveals the court cannot have had serious misgivings about Esqueda's performance. When the issue of whether to call the additional witnesses first arose at the end of trial, the court explained the question of whether to call the witnesses reduced to "whether you [Esqueda], based upon your representation of your client, taking your client's concerns into account but nonetheless making the ultimate decisions as the trial attorney in this case, whether you think it's in your client's best interest to call them . . . ." By that point, the trial court had had ample opportunity to observe counsel's performance throughout the course of the proceedings, and we do not believe the trial court would have placed as much stock in Esqueda's judgment as it did if it believed the quality of the representation defendant received had been inadequate. That is consistent with our own review of the record, which shows counsel effectively cross-examined prosecution witnesses and argued vigorously on defendant's behalf to shift responsibility for the escalation of the confrontation to the South Side members.

Defendant does not agree that Esqueda's decisions were reasonable and contends the quality of representation he received was quite subpar; indeed, he has raised separate claims that counsel was ineffective in failing to call the two witnesses, in advising him to waive jury trial, and in making two remarks against defendant's interest. He suggests this low quality of

representation was the reason for his request for self-representation. We discuss these claims in more detail in the next section of this opinion addressing defendant's ineffective assistance of counsel claim (in which we hold counsel's performance was attributable to reasonable tactical choices).

Defendant next contends he did not display a prior proclivity to substitute counsel, and we do not disagree. But the trial court did discuss this factor obliquely when it noted that defendant initially had appointed counsel and then changed to retained counsel. This change occurred early in the proceedings, before the case was dismissed (because of the unavailability of a witness) and later re-filed by the district attorney. On these facts, the long-term nature of defendant's representation by retained counsel actually weighed against granting defendant's untimely request for self-representation. The issue of calling the two witnesses did arise "way back" before the prosecutor's earlier dismissal of the case and defendant considered dismissing Esqueda at that time. There was therefore no apparent reason for defendant to wait until the end of the second trial to seek self-representation based on his disagreement with that approach. The trial court made this same point, indicating that defendant should have discussed his concerns with counsel when he hired him.

As defendant acknowledges, the trial court expressly discussed the penultimate *Windham* factor, "the length and stage of the proceeding." (*Windham*, *supra*, 19 Cal.3d at p. 128.) As the court pointed out, "the trial is now over in terms of the calling of the witnesses."

The trial court did not expressly discuss the last *Windham* factor, "the disruption or delay which might reasonably be

expected to follow the granting of such a motion." (*Ibid.*) However, the court and defense counsel had just discussed the potential difficulties of calling witnesses who were not on the defense witness list. As the court noted, the prosecution might well deserve "an opportunity to prepare to examine those witnesses." Such an opportunity would likely require a continuance. In addition, Esqueda told court that one of the witnesses had informed him that "she was not going to testify and told me that the other witness did not want to testify." If the witnesses were in fact uncooperative, that would only cause greater disruption and delay.

The record accordingly permits us to conclude the trial court gave consideration to the appropriate factors and did not abuse its discretion in denying defendant's request to represent himself. (*People v. Bradford*, *supra*, 187 Cal.App.4th at p. 1354.) Defendant's motion was made extremely late in the trial and was likely to result in delay. (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1278 [discretion on motion for self-representation made even on the first day of trial, not at the end of trial as here, "should seldom be exercised in favor of granting the motion"].)

D. New Trial Motion Alleging Ineffective Assistance of Counsel

Defendant contends the trial court erred in denying his motion for a new trial, which argued Esqueda provided ineffective assistance of counsel. In that motion, he contended his attorney was ineffective for two reasons: because he decided against calling the two witnesses, who would have testified defendant was at a family gathering close to Sunny Liquor before

the shooting; and because he advised defendant to waive his right to a jury trial.

1. Applicable law

Although Penal Code section 1181 does not include ineffective assistance of counsel among the enumerated grounds for ordering a new trial, it is well established that a motion for a new trial may be based on a claim of ineffective assistance of counsel. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582-583.) We evaluate a trial court's denial of such a new trial motion using a mixed standard of review. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724-725.) We uphold the trial court's express or implied factual findings if they are supported by substantial evidence. (*Id*. at p. 724.) "[A]ll presumptions favor the trial court's exercise of its power to judge the credibility of witnesses, resolve any conflicts in testimony, weigh the evidence, and draw factual inferences." (*Ibid*.) We exercise our independent judgment to determine whether, on the facts so found, defendant was deprived of his constitutional right to effective assistance of counsel. (*Id*. at p. 725.)

"In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [ ]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217 [ ].)" (*People v. Carter*, *supra*, 36 Cal.4th at p. 1189.) We presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions

can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel." (*Ibid*.)

A defendant satisfies the prejudice requirement when he shows "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra*, 466 U.S. at p. 694.) Where "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice[,] . . . that course should be followed." (*Id*. at p. 697.)

2. Witnesses

As we have already had occasion to mention, defense attorney Esqueda explained on the record at trial that he was making a tactical decision not to call two witnesses. He represented to the court that one of the two witnesses told him she was not going to testify and the other witness did not want to testify either.

In support of his motion for a new trial, defendant identified the two witnesses as Valerie Sanchez (Valerie) and Melissa Ceniceros (Ceniceros). Each submitted a declaration.

Valerie declared she was defendant's wife and had informed Esqueda that she was in fact willing to testify to the following facts on defendant's behalf. On the night in question, Valerie, defendant, and their children were at a party at Ceniceros's home, which was "within a few block [sic]" of Sunny Liquor. Ceniceros's boyfriend, Alfredo Jara Jr. (Jara), is Valerie's brother and had never been associated with any gang and was not a gang member. Someone at the party asked defendant to drive Jara to a liquor store to buy more beer and party supplies.

Defendant was reluctant, but Valerie asked him to go. He drove off with Jara in the front passenger seat. Esqueda told Valerie he did not want her to testify because he did not want her to disclose that her brother, whose identity was apparently unknown to the authorities at that time, was the front seat passenger.

Ceniceros declared she hosted a party at her home on March 29, 2013, which is "approximately one block away from the Sunny Liquor Store." Defendant, Valerie, their children, and Jara were present. Like Valerie, Ceniceros said that her boyfriend Jara was not a gang member "to [her] knowledge." At some point during the party, Ceniceros asked Jara to have defendant drive him to buy more party supplies. She told them to first try Rite Aid, and if it was closed, to go to Sunny Liquor. After she heard defendant had been arrested, Ceniceros told Valerie to contact defendant's lawyer so she could "provide him with [her] information and explain how [she] could be an important witness at trial for [defendant]." She later spoke with Esqueda, who was "very short and rude" on the phone, and he told her that unless she saw something at the scene, her testimony was not necessary.

In his declaration filed in connection with defendant's new trial motion, Esqueda stated he had read Valerie's declaration and it was "substantially different [than] what she told me." According to Esqueda, Valerie told him defendant was drinking heavily at the "family function" and that they were separated, so she left while defendant stayed behind. According to Esqueda, Valerie said defendant wanted her to testify she was still at the party when he left to make a beer run, but she was not. Instead, she only heard that they ran out of beer at the party and that

defendant, Jara, and another person left to get beer. Esqueda did not believe Valerie's testimony was significant, and he did believe there was a risk to calling her as a witness. He did not know Jara and had no interest in protecting him.

Esqueda's declaration stated he did not call Ceniceros because he did not think her testimony about the beer run was significant. In his view, it did not matter if the party was a few blocks from the liquor store because the relevant facts were that defendant "was the driver and he elected to pull into the liquor store where the confrontation ensued with the South Side Pomona gang members. He also could have walked away once the gang innuendos commenced but he opted to stay."

The trial court did not make an explicit credibility finding or resolve the conflict in the declarations, but the court did say that no details of the conversations between Esqueda and the witnesses were in the record. Without an evidentiary hearing to resolve the conflict, we are not in a position to determine on direct appeal that Esqueda's performance fell below prevailing professional norms. (*People v. Fosselman* (1983) 33 Cal.3d 572, 581-582; *People v. Dennis* (1986) 177 Cal.App.3d 863, 872 ["[C]laims of ineffective assistance of counsel will frequently be unresolvable on the record. In such circumstances the court expressed a preference for an evidentiary hearing where the matter may be fully explored"]; see also *People v. Bolin* (1998) 18 Cal.4th 297, 334 ["Whether to call certain witnesses is also a matter of trial tactics, unless the decision results from unreasonable failure to investigate"].)

The trial court did, however, indicate that in its view neither witness's testimony would have made a difference in the outcome at trial. The court stated, "He may have come from a

party. He may have come from a family event. He may have been there for a beer run only, and they were not cruising the area looking for trouble outside of their gang territory." Nevertheless, as "the truck was pulling in and passing those individuals, the driver and the front seat passenger tracked them with their eyes as they drove into the parking space." The trial court continued, "[W]hether the passenger was a gang passenger or not, whether they left a party or not, . . . they're the ones who created the situation because what they did is simply they took the opportunity outside of their gang territory to confront other individuals that they thought may be gang members, who obviously had to be from another gang since they were not in their territory."

We have independently reviewed the record and reach the same conclusion as the trial court. We observe, first, that the value of the women's declarations is diminished significantly by their failure to account for the presence of Barrios, the back seat passenger, who was armed and was the actual shooter.[15] Their declarations shed no light on where he came from or why he was in defendant's car. But even assuming the women's testimony could credibly call into question the theory that defendant and his companions were cruising in rival gang territory looking for trouble, it says nothing about the North Side group's behavior when they found trouble, even if inadvertently. Defendant, as the driver, could have decided not to park and get out of the car. He could have just driven elsewhere. Or he could have walked into the liquor store that was right in front of where he parked

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[15] Valerie stated in her declaration that she learned through discovery that the rear passenger shot a woman. Ceniceros does not mention a third passenger at all.

his SUV. He did none of these things, and instead accompanied his companions to confront the South Side group upon exiting the SUV. We (like the trial court) are also unmoved by the witnesses' post-verdict assertion that, to their knowledge, Jara was not a gang member. The trial court necessarily found the trial testimony of Ruiz and Mora credible, and concluded that "[w]hether the passenger was a gang passenger or not" the North Side group, including defendant, instigated the gang confrontation.

There is no reasonable probability that defendant would have received a more favorable outcome if Valerie and Ceniceros had testified.

3. Jury trial waiver

In bringing the new trial motion, defendant's new attorney Alex Kessel argued, in effect, that an attorney's performance always falls below prevailing professional norms when the attorney advises a defendant to waive a jury trial in a serious felony case with contested factual issues. This is not the law. Our Supreme Court has rejected a claim that counsel was ineffective for advising a defendant to waive a jury trial in a death penalty case. (*People v. Scott* (2003) 15 Cal.4th 1188, 1213.) As the Supreme Court explained, "We will . . . 'not assume inadequacy of representation unless counsel had no conceivable legitimate tactical purpose' for waiving a jury. [Citation.]" (*Ibid.*) Among the possible legitimate reasons the Court identified were a belief by counsel that "the particular judge to whom the case was assigned would be sympathetic to defendant" and the possibility that the court would deal with an issue differently than a jury might. (*Id.* at p. 1214.)

Here, Esqueda stated at trial that he advised defendant to waive a jury trial because it was his "genuine belief that as soon as the People presented the opening statement and the 1101 of the 2009 [i.e., the facts of the Thomas incident], that the jury would be sitting there thinking guilty." He later explained in his declaration submitted in connection with the prosecution's opposition to the new trial motion that he had known Judge Genesta professionally over a twenty year period, found him to be "a very fair and impartial judge," and believed that defendant had a better chance of prevailing before the judge than before a jury. Esqueda believed a jury would look unfavorably on the Thomas evidence, the video evidence of both crimes, and the gang evidence. He also believed defendant had a better chance of prevailing before Judge Genesta on the aiding and abetting issues, including the natural and probable consequences doctrine, than he would with a jury.

In the course of ruling on the new trial motion, Judge Genesta stated that he had been a defense attorney with a substantial criminal practice before being appointed to the bench. He concluded Esqueda could reasonably decide, as a tactical matter, that a judge was more likely to be fair and impartial than a jury in a gang case, particularly one where the defendant previously had been convicted on remarkably similar facts. In our view, the fact that defendant ultimately did not prevail before the court did not make his attorney's advice to waive jury unreasonable. (See *People v. Weaver* (2001) 26 Cal.4th 876, 926 ["courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight"].)

Defendant contends Esqueda's decision was not a tactical one at all, but was made because Esqueda was not prepared for

trial. Defendant submitted a declaration stating Esqueda tricked and pressured him into waiving a jury trial by saying that he knew Judge Genesta very well and used to play golf with him. Esqueda "promised" that defendant would get a better result from the judge.

Esqueda, for his part, denied playing golf with Judge Genesta or telling defendant that he had done so. Indeed, Esqueda denied that he played golf at all and averred he knew Judge Genesta only professionally. Judge Genesta similarly denied any personal relationship with Esqueda. He had known him professionally before being appointed to the bench, but not well. He had never had lunch with Esqueda "let alone never golfed with him."

The trial court made it clear that it did not find defendant's contentions on the jury waiver issue to be a convincing ground on which to grant a new trial. As the judge noted, defendant's assertions were "pretty extreme in terms of what was represented to [him] to waive jury; that the defense counsel has a special relationship with the judge; that we had golfed together; that – it's almost like saying, 'the fix is in,' so to speak with a wink and a nod, I guess, is what's being claimed by the defendant. [¶] And . . . I have a declaration from Mr. Esqueda that denies any such conversation ever took place, that he's ever had any such contact with me or played golf with me or anything like that, which is true." The court continued, "The problem is that you have the burden, and what I have is the defendant who is now in a credible predicament who is making some extreme assertions, that I have to weigh that, in terms of his motives to exaggerate, versus an attorney who is denying making those representations."

We defer to the court's finding that defendant's declaration was unworthy of belief. (See *People v. Richardson*, *supra*, 43 Cal.4th at p. 1030.) We have also independently reviewed the record and find Esqueda's decision to waive a jury trial to be a reasonable tactical choice. The Thomas evidence was quite damaging to the defense, and a defense attorney could reasonably think there was less risk that an experienced trial judge, as opposed to one or more jurors, would be tempted to use evidence for an improper purpose.

E. Free-Standing Ineffective Assistance Claims

Defendant raises two additional claims of ineffective assistance, which he did not raise in his motion for a new trial. He contends his attorney failed to highlight key exculpatory portions of the video and made gratuitous remarks harmful to defendant's interests. We review these claims in accordance with the established standard of review for ineffective assistance of counsel claims on direct appeal.[16] That is, "'where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions.' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1051; *People v. Mendoza Tello* (1997) 15 Cal.4th 264,

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[16] The Attorney General contends defendant has forfeited these claims by failing to raise them in his new trial motion. It is true defendant may not point to these claims to show the trial court erroneously denied his new trial motion, but there is nothing that forecloses him from raising an ineffective assistance claim on direct appeal independently. The forfeiture argument is meritless.

266-267 [claim of ineffective assistance more appropriately decided in a habeas corpus proceeding].) And even where there is no conceivable reason for an omission, reversal is still unwarranted if a more favorable outcome is not reasonably probable absent the omission. (*People v. Carter, supra,* 36 Cal.4th at p. 1189.)

1. Video footage

We are not persuaded by defendant's argument that there is a reasonable probability he would have achieved a more favorable outcome if his attorney had played the video footage from camera 15 during trial. We have viewed the camera 15 video, which is part of the record on appeal, and it depicts little that is not depicted in the camera 9 video, which was played during trial. Like the camera 9 video, the camera 15 video shows La Mesa and the fenced area next to Sunny Liquor. Camera 15 appears to be set behind the fenced area, slightly angled toward Mission but essentially covering La Mesa. Unlike camera 9, camera 15 does show defendant's SUV turning onto La Mesa and then into the Sunny Liquor parking lot, but nothing in that footage is favorable to defendant.

As outlined in the background section of this opinion, the timing of the South Side group's movement is apparent from the camera 9 video. In our view, the camera 15 video does not show Cervantes or others in the South Side group were on their way to the Sunny Liquor parking lot before the front passenger got out of defendant's SUV.[17] Based on a comparison of times in the

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[17] The South Side group stopped walking before defendant's car was parked, but they appear to be waiting for the two stragglers in the group. The group's pause would also be consistent with Ruiz's testimony that the SUV occupants had

camera 1 video, which shows defendant's SUV in the parking lot, and the camera 9 video, which shows the South Side group on La Mesa, Cervantes's movement toward the parking lot (as opposed to his movement further into the middle of La Mesa street) appears to begin almost simultaneously with the front seat passenger opening his door. Nothing in the camera 15 video calls this into question. The camera 15 video provides a less useful view of the altercation because it is further away than the camera 9 video and the men are partially obscured from view by the fence. There is no reasonable probability that defendant would have obtained a more favorable result if counsel had played video from camera 15 for the court.

2. Gratuitous remarks

We likewise see no ground for reversal based on defendant's contention that his trial attorney made two remarks on the record to explain certain of his tactical choices, once at the beginning of trial and another near the end. Defendant believes the remarks were gratuitous and against his interests.

In the first such instance, Esqueda stated, "The court just articulated . . . why I told [defendant] . . . that he better waive a jury trial . . . . [A]s soon as the People presented the opening statement and the 1101 of the 2009, that the jury would be sitting there thinking guilty." Although we see no reason for making the comment as a matter of trial strategy or tactics (which is true of many other comments commonly uttered over

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glared at them. Cervantes, and perhaps some of the others in the South Side group, may have simply been trying to get a better look at who was in the SUV and determine whether the occupants posed a threat.

the course of a trial), there is no apparent prejudice from the statement. The prejudicial potential of the Evidence Code section 1101 evidence was apparent without any comment from counsel. There is no reasonable probability that defendant would have obtained a more favorable outcome if Esqueda had not made the remark.

Esqueda also stated on the record that he advised defendant "that in calling character references in this case it's going to open the door to bad character . . . . I'm calling these witnesses at his request . . . . [I]t's against my advice." Again, this remark caused no apparent prejudice. The court was well aware that defendant was a long-time gang member with a serious prior conviction. The possibility that there could be evidence of defendant's bad character would not have been news to the court.

F. Character Evidence

Defendant contends the trial court erred in sustaining the prosecution's objection when Esqueda asked gang expert Berger whether Cervantes had a criminal record, which he contends would have shown that Cervantes had a character for violence. Defendant maintains the court's ruling infringed on his federal constitutional right to present a defense.

1. Applicable law

Although the United States Supreme Court has "determined that the combination of state rules resulting in the exclusion of crucial defense evidence constituted a denial of due process under the unusual circumstances of [a] case before it, it did not question 'the respect traditionally accorded to the States

in the establishment and implementation of their own criminal trial rules and procedures.' (*Chambers v. Mississippi*, [1973] 410 U.S. [284,] 302–303, 93 S.Ct. 1038.)" (*People v. Cornwell* (2005) 37 Cal.4th 50, 82, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390.)

Thus, "[a] defendant has the general right to offer a defense through the testimony of his or her witnesses (*Washington v. Texas* (1967) 388 U.S. 14, 19 [87 S.Ct. 1920, 18 L.Ed.2d 1019]), but a state court's application of ordinary rules of evidence—including the rule stated in Evidence Code section 352—generally does not infringe upon this right [citations]." (*People v. Cornwell, supra,* 37 Cal.4th at p. 82.)

Under Evidence Code section 352, a trial court has discretion to exclude evidence if "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." A trial court may exclude evidence under section 352 "to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Mills* (2010) 48 Cal.4th 158, 195.)

Evidence of a victim's character is admissible in a criminal action to prove that the victim acted in conformity with that character. (Evid. Code § 1103, subd. (a)(1).) Thus, evidence of an ostensible victim's violent character may be relevant to show the victim was actually the aggressor in an altercation. The victim's character may be shown by evidence of his reputation or by specific acts. (*People v. Wright* (1985) 39 Cal.3d 576, 587.)

2. Analysis

The trial court did not err in sustaining the objection to the question asked of gang expert Berger. Geary was the person who punched Barrios, not Cervantes. There is nothing in the record to support an inference that Cervantes encouraged Geary to throw the punch, and Cervantes himself did not engage in any violent physical behavior during the encounter. Thus, Cervantes's character for violence was not directly relevant.

Defendant protests that the record does not clearly show who made the first challenge, and that proof of Cervantes's violent character would have supported an inference that he made the first challenge. We would question whether such a specific inference (he initiated the confrontation because he had been arrested for some assumed, unspecified offense in the past) would be reasonable even if defendant's characterization of the record as ambiguous were correct. But it is not correct, and testimony from Ruiz and Mora was quite clear on this point. Ruiz testified defendant and the front seat passenger issued the first challenges and Cervantes responded. Similarly, Mora described the men from the SUV as asking Cervantes and the others if they banged and Cervantes and/or the others responded to that question. At most, evidence that Cervantes had a violent character would have been weakly in tension with this testimony, and the trial court would have been justified in crediting Ruiz and Mora's account of events even if it knew Cervantes had been arrested in the past. Sustaining the objection did not deprive the defense of crucial evidence that could amount to the denial of the right to present a defense.

Moreover, any error in excluding the evidence would be assessed under *People v. Watson* (1956) 46 Cal.2d 818. The trier

of fact was aware that South Side was a violent gang, and that Cervantes was a member of that gang, but found credible Ruiz and Mora's testimony that it was defendant and his companions who first issued the challenges. There is no reasonable probability that additional specific evidence that Cervantes had been arrested for a violent crime or crimes would have caused the trier of fact to change its evaluation of Ruiz and Mora's credibility and find Cervantes to be the aggressor.

G. Conviction as a Principal and an Accessory

Defendant contends that he could not properly be convicted of being both (1) an aider and abettor to the commission of the attempted murder and assault with a deadly weapon and (2) an accessory to those crimes. He is right.

Section 32 provides for criminal punishment of an accessory, that is, a person "who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony . . . ." An older Court of Appeal case, *People v. Prado* (1977) 67 Cal.App.3d 267 (*Prado*), expressed the view, consistent with out-of-state authority and respected commentators, that a conviction for being an accessory to a charged crime is categorically inconsistent with a conviction for being a principal (i.e., an aider and abettor) in the same charged crime. (*Id.* at pp. 271-273.) More recent California cases, however, have adopted a more nuanced view. These cases reject the proposition that convictions for being a principal and an accessory are always mutually exclusive and instead take the

view that such dual convictions are prohibited only where predicated on "'[e]ssentially the same acts.'" (*People v. Mouton* (1993) 15 Cal.App.4th 1313, 1323 [quoting *Prado*]; see also *In re Malcolm M.* (2007) 147 Cal.App.4th 157, 169, 171 [agreeing with cases that "eschew or limit *Prado*" but holding a defendant can only be convicted of being an accessory to a felony in which he or she was also an aider and abettor where "the acts constituting that felony . . . have ceased at the time of the conduct that violates section 32"] (*Malcolm M.*).)

The question here is therefore whether defendant's conviction for being an accessory is predicated on essentially the same acts as his convictions for aiding and abetting an attempted murder and assault with a deadly weapon, or, in the language of *Malcolm M.*, whether the acts constituting the felonies ceased at the time of the conduct that violates section 32. On that question, we find the reasoning of *In re Eduardo M.* (2006) 140 Cal.App.4th 1351 dispositive.

The court in that case held "a defendant who is convicted as a principal cannot also be convicted as an accessory solely on the basis of his immediate flight from the crime scene and his subsequent denials of his own involvement, even if that conduct incidentally helps other principals to escape." (*Id.* at p. 1359 [contrasting *People v. Mouton* and another case because the accessory convictions there rested upon the defendants' attempt to dispose of murder weapons, not "mere flight"].) We follow *Eduardo M.* and conclude defendant's accessory conviction cannot stand because it rests solely on his immediate flight from the crime scene. Indeed, the surveillance video indicates the acts on which the prosecution relied to convict him as an accessory were immediate flight in the truest sense of the term: defendant

flipped up the license plate on his SUV less than 10 seconds after Barrios shot Ruiz and began to drive away just 10 seconds after that. Because the accessory and principal convictions are inconsistent on the facts here, the accessory conviction must be vacated. (*People v. Francis* (1982) 129 Cal.App.3d 241, 252-253.)

H. Cumulative Error

Defendant contends that even if the effect of the asserted errors in this case are not prejudicial when considered individually, the cumulative effect of those errors requires reversal of his convictions. The contention fails because we have found only one error of limited significance.

DISPOSITION

Defendant's section 32 accessory conviction is hereby vacated, and the judgment is affirmed in all other respects. The superior court shall prepare an amended abstract of judgment to reflect the judgment as modified and deliver the amended abstract to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

TURNER, P.J.

KUMAR, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.